No. 355

IN THE

SUPREME COURT OF THE UNITED STATES

INTERNATIONAL HARVESTER COMPANY and
INTERNATIONAL HARVESTER COMPANY
OF AMERICA, *Appellants*,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robertson
and Frank G. Thompson, as members of and constituting
the Board of Department of Treasury,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF INDIANA

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT.

JOSEPH J. DANIELS,
EDWARD R. LEWIS,
PAUL N. ROWE,

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT.

Appellees have filed their Statement of Matters and Grounds Making Against the Jurisdiction of This Court and with that Statement have also filed their motion to dismiss appellants' appeal in the above entitled cause or to affirm the decision of the Supreme Court of Indiana therein.

Pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States and to Rule 7, Paragraph 3, appellants file this brief opposing said motion.

I

THE PROPER REMEDY IS APPEAL AND NOT CERTIORARI

Appellees, in their brief in support of their motion, state on page 2 that section 237(a) of the Judicial Code (28 U. S. C. 344a) grants the right of appeal only where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and that since "the applicability and not the validity of the Indiana Statute is involved," the application of appellants to this court should be considered, if at all, as an application for a writ of certiorari and not an application for appeal.

But it has been conclusively held by the United States Supreme Court that where the appellant contends that a statute as applied is unconstitutional under the Federal Constitution and the decision of the State Supreme Court has been in favor of the validity of the statute as so applied, the remedy is appeal and not certiorari.

The case of *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, was brought on writ of error to review a judgment of the Court of Appeals of Kentucky. The court said, Mr. Justice Van Devanter writing the opinion, that a statute "may be invalid as applied to one state of facts and yet valid as applied to another." The opinion proceeds to say that the provisions quoted from the Judicial Code "show that in cases where the validity of a state statute is drawn in ques-

tion because of alleged repugnance to the Constitution, the mode of review depends upon the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error; and if it be resolved against the validity, the review can only be on writ of certiorari." Since then, of course, the remedy by appeal has been substituted for remedy by writ of error.

In *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, the appellant took an appeal to the United States Supreme Court from a decree of the Supreme Court of Tennessee, which affirmed an order of the State Highway Commission of Tennessee requiring the separation of grades at a railroad crossing. Here, obviously, there was no question of the validity of the Tennessee statute if properly applied. The sole question was its constitutionality as applied by the State Highway Commission and sanctioned by the Supreme Court of Tennessee. Mr. Justice Brandeis, writing the opinion, said, "A statute valid as to one set of facts may not be valid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably." (Page 415.)

Now in this case the appellants have contended from the filing of the complaint in the trial court through the Indiana Supreme Court that the Indiana Gross Income Tax as applied to transactions in Classes C, D and E is a burden on interstate commerce and denies due process of law under the Fourteenth Amendment. The question of the validity of the Indiana Gross Income Tax Act under the federal Constitution was directly involved, and the Indiana Supreme Court could not have given judgment without decid-

ing such question. We submit, therefore, that the proper remedy is appeal and not certiorari.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226.

II

THE RECORD PRESENTS FOR DECISION SUBSTANTIAL FEDERAL QUESTIONS WHICH HAVE NOT BEEN RULED UPON BY THIS COURT.

Appellants believe that their Jurisdictional Statement fully covers most of the argument advanced by appellees in their Counter Jurisdictional Statement. Appellants will limit themselves in this brief to the new matters presented in Appellees' Counter Jurisdictional Statement.

CLASS D SALES

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation on gross receipts from interstate commerce.

Class D sales are sales by an International Harvester branch house in Indiana to a buyer, either a dealer or consumer in Kentucky, Ohio or Illinois, where the goods are delivered to the buyer in Indiana and are taken by the buyer back to his home town in Kentucky, Ohio or Illinois.

The Supreme Court of Indiana has sustained the tax in Class D by Indiana, the state of *delivery* to the buyer, and it gives as a reason for its decision that the United States Supreme Court has held that the state of the *buyer* can tax gross receipts from interstate transactions. But the state of the buyer in Class D is not Indiana where deliv-

ery takes place but is Ohio, Kentucky or Illinois where the buyers reside.

Appellees now assert that the question is foreclosed by the decisions of the United States Supreme Court, citing the New York City retail sales tax cases, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, and companion cases decided the same day; *Department of Treasury of Indiana v. Wood Preserving Corporation*, 313 U. S. 62; and *Allied Mills v. Department of Treasury*, — U. S. —, 87 L. Ed. 514, 63 S. Ct. 666.

We believe that we have sufficiently shown in our Jurisdictional Statement the distinction between the New York City retail sales tax and the Indiana gross income tax as applied to International Harvester Company in Class D. It was because of the crucial differences between the New York City tax and the Indiana tax that the United States Supreme Court said in the case of *McGoldrick v. Berwind-White Coal Mining Co., supra*, that the rationale of the *Adams* case did not call for condemnation of the New York City tax. We submit, therefore, that if the tax in Class D is sustained on the authority of this Court's decision in *McGoldrick v. Berwind-White Coal Mining Co.*, then the words of this Court in that case, that the rationale of the *Adams* case did not call for condemnation of the New York City tax, are utterly meaningless.

But for another reason the tax in Class D does not depend on the decision in the New York City cases. The New York City tax was levied by the jurisdiction where the buyer lived, which was the same jurisdiction where delivery to the buyer took place.

The tax in Class D is levied by the jurisdiction where delivery to the buyer took place, but the buyer's state was

elsewhere—in Ohio, Kentucky or Illinois. The tax in Class D, therefore, raises directly the question of double taxation which the New York City tax did not raise.

Likewise, in the *Allied Mills* case the state of delivery to the buyer was Indiana and the state where the buyer lived was Indiana.

The tax in the *Allied Mills* case is therefore also vitally different from the tax in Class D where the state of delivery is Indiana and the state of the buyer is Ohio, Kentucky or Illinois.

Appellees, however, do not adopt the reason given by the Supreme Court of Indiana in this case in upholding the tax on Class D sales, that the state of the buyer can tax, but they contend that the rule is that the state "where possession of the article sold is transferred to the purchaser" is the state that can tax the gross receipts.

Appellees instance the case of a purchaser whose home is in another state going to a department store and buying an article and taking it back to his home town. Likewise, appellees cite the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, where it was held that the delivery of railroad ties by the Wood Preserving Corporation to the Baltimore & Ohio Railroad in Indiana was an Indiana transaction so that the gross receipts from the sale of the railroad ties were subject to the Indiana gross income tax, although the railroad immediately shipped the ties to destinations in other states.

But both the department store illustration and the *Wood Preserving* case are strikingly different from the case of International Harvester Company's sales in Class D. The record shows that the branches of International

Harvester Company have been long established and that their territories overlapping state lines have likewise been long established. A dealer or a consumer in the territory of one of those branches who orders an article from the branch and then goes to the factory or to the branch and gets the article personally and takes it back to his home is in a very different position from a casual purchaser at a department store. The casual purchaser at a department store has no antecedent relationship with the store. He buys an article there and takes it to his home town and that may be the beginning and end of his relation with the store. But the dealers of the International Harvester Company operate under annual contracts covering their requirements for the year. Both dealers and consumers are located in the branch house area of the branch making the sale, and they habitually deal with that branch house, not casually or accidentally as in the case of the out of state patron of the department store. The goods bought by them from the International Harvester Company are either shipped from the company's branch house, factory, transfer house or retail outlet direct to the dealer or consumer or the dealer or consumer gets the goods personally at the factory, transfer house, branch house or retail outlet and takes them back to his home town.

There was ample evidence in the record of a material saving in delivery charges if the buyer got his article himself and transported it back from the factory or branch house to his home town.

It is true that in Class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think that there was any practical possibility that he would do anything with it but take it back to his own home

town, which he did do. If the buyer were a dealer he intended to take it to his place of business. If the buyer were a user he intended to take it to his home. He had no other place of business and he had no other home.

Moreover, the record shows that 67.6% of the sales involved in this case were on conditional sales contract and it is obvious that a purchaser under a conditional sales contract cannot remove the goods from jurisdiction to jurisdiction at his own pleasure.

In the *Wood Preserving* case the Baltimore & Ohio Railroad Company, having its railroad line in Indiana and there engaged in business, bought railroad ties of the Wood Preserving Corporation. The Wood Preserving Corporation had no permanent place of business in Indiana but bought the railroad ties in Indiana from Indiana producers. The ties were inspected in Indiana by the Railroad Company. The Wood Preserving Corporation paid the Indiana producers for the ties accepted by the Railroad Company. Bills of lading were then made out with the Wood Preserving Corporation as consignor and the Railroad's Chief Engineer of Maintenance at Finney, Ohio, as consignee, and the ties were sent to Finney, Ohio, for treatment. The treating plant at Finney, Ohio, belonged to a subsidiary of the Wood Preserving Corporation. Mr. Chief Justice Hughes in writing the opinion of this Court stated that the Wood Preserving Corporation purchased the ties from the local producers and "sold and delivered these ties in Indiana to the Railroad Company." He added that the transactions "were nonetheless intrastate transactions because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment."

In the *Wood Preserving* case the ties had only a temporary destination outside Indiana and after treatment in Ohio might in part or all be returned for use on the railroad tracks in Indiana. And, most significant, the buyer was a railroad having its tracks and doing business in Indiana; the railroad was an Indiana buyer; Indiana was both the buyer's state and the state where delivery occurred.

There was only one destination at which a dealer of the International Harvester Company had any use for the goods and there was only one destination at which a consumer buying Class D goods would have any use for the goods, namely, in each case, the home town of the dealer or consumer. In our Class D sales the goods immediately have a final and ultimate destination outside Indiana, and Indiana is not the buyer's state, but only the state of delivery.

Likewise, in the case of *Superior Oil Co. v. Mississippi*, 280 U. S. 390, Mississippi was both the buyer's state and the state where delivery occurred and, as Mr. Justice Holmes said, the subsequent interstate shipment was accidental and in no way concerned the seller, which is not true in our Class D sales.

Therefore, in all of the cases relied on by appellees, in which a tax was upheld, the taxing state was both the buyer's state and the state where delivery was made. Appellees have cited no decision of this Court in which the state where delivery alone occurs has been permitted to lay a tax on an interstate sale of goods.

In short, the argument that the state of delivery to the buyer can tax the gross receipts of Class D sales

presents the crucial issue of this appeal, which is whether both the state of delivery to the buyer and also the state where the buyer lives can tax without apportionment the same gross receipts. This question did not arise in the *Wood Preserving* case but it does definitely arise in the case of Class D sales.

In appellants' Jurisdictional Statement reference is made to the Ohio use tax which provides that if an Ohio resident goes to another state and buys an article and brings it into Ohio he is subject to the Ohio use tax.

Appellees in their Counter Jurisdictional Statement on page 10 refer to one of the stipulations in this case which is:

> "(j) The gross receipts involved in this suit for a refund *were not taxed and were not used as a measure of any tax assessed in any other jurisdiction* than the State of Indiana and no tax has been paid by the plaintiffs to any taxing jurisdiction other than the State of Indiana upon these identical gross reecipts or which was measured by them."

The paragraph above quoted might have been more complete but we submit that read as a whole it refers to taxes paid by appellants, as obviously the payment of taxes by the buyer in other states would not be within the knowledge of either appellants or appellees. The stipulation therefore does not preclude the possibility of the imposition of a use tax in the buyer's state on the use of goods purchased in Indiana.

It is clear that the Ohio use tax definitely asserts the intention of Ohio to tax the use of an article in Ohio the delivery of which was obtained by the buyer in Indiana.

Moreover, if the rule laid down by the Supreme Court of Indiana is sustained, that the buyer's state can tax gross receipts from an interstate sale, the state in which the buyer lives may assert the right not merely to lay a use tax on the buyer but also the right to tax the seller on the gross receipts from the sale.

Indeed, it is apparent that the opportunity to the buyer's state to tax the seller on gross receipts from such sales as Class D sales is too tempting to be resisted, as is demonstrated by the attempt to that end now being made by the State of Illinois.

Since our Jurisdictional Statement in this appeal was filed there has come to our notice a recent amendment of the Illinois Retailers Occupation Tax enacted by the Illinois Legislature in 1943, effective July 1, 1943 (S. B. 512, Illinois Laws 1943). This amendment added Section 1(b) to the Illinois Retailers Occupation Tax, which provides that a "person" is engaged in the business of selling tangible personal property at retail in Illinois, "whenever such 'person', either himself or through an employe or employes located in" Illinois or coming into Illinois for the purpose, "engages habitually, for livelihood or gain, in selling activity" in Illinois, "the primary purpose of which selling activity is to promote the 'sale at retail' of tangible personal property by such 'person', as the phrase 'sale at retail' is defined in this Act", and that such person is subject to the Illinois retail sales tax, notwithstanding that the orders for the sale of such property are accepted outside of Illinois, and notwithstanding that the tangible personal property which is sold as the result "of such selling activities in this state is not at the time of the sale located in this state, and notwithstanding the fact that the ownership of or title to

such tangible personal property is not transferred in this state to the purchaser."

In other words, the State of Illinois says that if an out of state dealer sends an employe or other representative into Illinois to engage in selling activities, the out of state seller is engaged in the business of selling tangible personal property at retail in Illinois and is taxable on the gross receipts from a retail sale to an Illinois buyer, notwithstanding the fact that the buyer takes delivery of the article outside of Illinois and brings it himself into Illinois.

It is obvious that if the state of delivery, Indiana, can tax Class D sales and the buyer's state, Illinois, can tax retail sales in Class D, there is a double tax burden.

This is a question which the United States Supreme Court has not yet met in the application of the Indiana gross income tax. This Court declared definitely in the *Adams* case and in *Gwin, White & Prince v. Henneford*, 305 U. S. 435, not merely that actual multiple taxation of gross receipts from interstate transactions would not be permitted, but that a situation would not be permitted to arise where such multiple taxation could be imposed. It refused in that case to sustain the tax, because to sustain it would authorize other states to impose a similar tax. It was not merely an actual multiple tax which was forbidden. It was also the possibility or threat of a multiple tax which this Court opposed.

Ever since the decision of this Court in the case of *McGoldrick v. Berwind-White Coal Mining Co., supra*, there has been doubt as to the implications of that decision on the taxation of gross receipts from interstate commerce. Can the state of the buyer tax such entire gross receipts without apportionment? Can the state of delivery to the buyer,

if different from the state of the buyer, also tax the entire gross receipts without apportionment? Likewise, can the state of manufacture tax them? Or is the state of the buyer sacrosanct and the only state which will be allowed to tax them?

We submit that it is important that these doubts be cleared up and that there is therefore a very substantial and important federal question as to whether both the state of delivery, Indiana, and the state of the buyer, Ohio, Kentucky or Illinois, can tax the gross receipts from such transactions as Class D sales.

CLASS C SALES

Class C sales are sales by branches of International Harvester Company located outside of Indiana to dealers and consumers residing in Indiana who took delivery of the goods themselves in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works, Fort Wayne, Indiana, and a small amount of tillage implements manufactured by the Richmond Works, Richmond, Indiana.

Appellees state that the only extrastate element "involved in Class C sales was that due to the intra-corporate departmentalization of appellants' business." (Appellees' Counter Jurisdictional Statement, pp. 8, 10.)

We do not know what appellees mean when they say that "Appellant cannot avoid its tax burden by departmentalizing its business."

There is no departmentalizing of a business in the delivery of a motor truck from the factory in Fort Wayne to a buyer in Indiana.

The reference to departmentalizing the business is evidently taken from the case of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, where Mr. Justice Douglas said, on page 364, that the mail orders from buyers in Iowa sent to Sears, Roebuck's Chicago office were still a part of Sears, Roebuck's Iowa business and that Sears, Roebuck cannot "avoid that burden [namely the burden of collecting the use tax] though its business is departmentalized. Whatever may be the inspiration for these mail orders, however, they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."

It will be noted that no tax was imposed on Sears, Roebuck on these mail order sales completed by shipment in interstate commerce to the retail buyers in Iowa. Sears, Roebuck was merely made the collection agency of the State of Iowa for the Iowa use tax on the consumer buying the goods.

But in imposing even that duty the Court stressed the point that Sears, Roebuck had retail stores in Iowa selling to consumers in the same town or district in which the mail order purchasers also lived. In other words, Sears, Roebuck made retail sales by mail order to Iowa consumers who lived in the same territory that was handled by the local retail stores in Iowa. One consumer in the same town would go to a retail store and another consumer in that town would send a mail order to Chicago. Sears, Roebuck's Iowa store was as available to serve the mail order customers as it was to serve those who bought at the store. This was a unitary business and the Court held only that there was no invalid burden on interstate commerce in requiring the seller to collect the use tax owing by the buyer on mail order purchases. International Harvester Company's Class C sales are all in-

terstate sales constituting a unitary interstate business unlike the essentially local business conducted by Sears, Roebuck.

Therefore, in Class C sales there is no question of departmentalizing the business. There is merely involved the question of division of the territory handled by the Company's branches. There is no departmentalization of business involved in the sale by a branch in one state to a buyer in another state.

Perhaps then the appellees mean that the appellants have arbitrarily divided the territory handled by their branches.

The whole record of this case shows, however, that appellants have not arbitrarily fixed the branch house areas of their business; that appellants have not established the trade areas in which their branches operate, but that the trade has made the areas and not the areas the trade.

John L. McCaffrey, Vice-President in Charge of Sales of International Harvester Company, testified that it is trade that makes the city and not the city that makes the trade; that the buyer goes where he wants to go and the seller cannot make him go where he does not want to go. (Record, pp. 97-98.)

The map of the Department of Commerce of the United States giving wholesale grocery areas in 1936 shows that the trade areas in Indiana and adjoining states for the wholesale grocery business are strikingly similar to the branch house areas of International Harvester Company (Exhibit 3, Record, p. 145c). The map of the Traffic World introduced in evidence in this case giving wholesale and retail trade areas in the United States also shows trade

areas in Indiana strikingly similar to the branch house areas of International Harvester Company. (Exhibit 2, Record, p. 145b.) The branches at Kankakee, Cincinnati and Louisville whose territories extend into Indiana have been long established at those places, and the dealers and farmers living in Indiana have dealt with those branches for many years.

If, therefore, a dealer or farmer in Indiana in the territory of the Cincinnati Branch or of the Kankakee or Louisville branches, finds that it would save him delivery expense to go to Fort Wayne and get his truck, or to Richmond, Indiana, and get his tillage implements, obviously that is what he will do. He is dealing with the branch he has dealt with for years and he is getting delivery in the quickest and cheapest way possible.

We submit, moreover, that it is inconsistent for appellees to argue that appellants have departmentalized their business in Class C sales when the buyer lives in Indiana and not to recognize that the same argument would deny the right to tax Class D sales.

In Class D sales the buyer lives outside of Indiana. The branch which made the sale is inside Indiana.

In Class C sales the buyer is in Indiana and the branch which made the sale is outside Indiana.

If it is departmentalizing the business in Class C for a branch located outside Indiana to sell to a buyer in Indiana, then it is departmentalizing the business in Class D for a branch located in Indiana to sell to a buyer outside Indiana. The sales in Class D on this argument should be treated as if made by a branch outside Indiana, and in that case Indiana would have no claim to tax the gross receipts from such sales.

Applying to Class D sales appellees' own theory for Class C sales, it is therefore evident that Indiana should not be able to tax gross receipts from Class D sales.

The transactions in Class C under the cases cited in our Jurisdictional Statement are clearly interstate transactions. If the rule of the Indiana Supreme Court is adopted, that the state of the buyer can tax the entire gross receipts from an interstate transaction, then it would seem that the rationale of the *Adams* case is in effect reversed and that there is no reason why the state of the seller in Class C cannot tax the entire gross receipts without apportionment, resulting in double taxation of the same gross receipts.

CLASS E SALES

Class E sales are sales by branches of International Harvester Company located inside Indiana to dealers and users in Indiana of goods shipped from outside Indiana to the buyers in Indiana pursuant to orders or contracts specifying that shipment should be so made.

Appellees assert that the only extrastate element in Class E sales was that the goods were delivered to a buyer in Indiana by shipment from an out of state point. Appellees add that "This Court has directly held that such shipment does not relieve the sale from taxation," citing *Allied Mills v. Department of Treasury*, — U. S. —, 87 L. Ed. 514, 63 S. Ct. 666; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33.

We believe we have already sufficiently shown in our Jurisdictional Statement the controlling differences between the New York City gross receipts tax considered in *McGoldrick v. Berwind-White Coal Mining Co., supra,* and the Indiana gross income tax.

There are also important differences between the situation in the *Allied Mills* case and the International Harvester case.

It does not appear from the decision in the *Allied Mills* case that there was any provision in the contract which required that the goods should be shipped from outside of Indiana to the buyers in Indiana.

In this case the stipulation of facts shows that the contracts or orders in each sale provided that the shipment should come from outside Indiana to the buyers in Indiana.

In the *Allied Mills* case it appeared that the designation of the factory branch which would make the shipment of feeds to the Indiana buyers was made by Allied Mills itself solely to gain the advantage of freight differentials.

In the International Harvester case, however, there was strong evidence showing that the branch house areas of International Harvester Company were strikingly similar to the trade areas in the wholesale grocery business and in wholesale business generally and that the farmers and dealers in each of the areas in Indiana had dealt with those branches over a period of many years.

Moreover, it is a fair conclusion from the evidence that if in Class E a shipment was made from out of the state at the buyer's own direction it was so made either because the branch in Indiana did not have the goods on hand or because there was a saving in freight by getting the shipment direct from the factory or transfer house to the buyer instead of the buyer paying the freight first to the branch house and then from the branch house to his own home town. There was strong evidence showing that no branch could be expected to keep on hand sufficient stock to handle

all its orders during the selling season but some would have to come from the factory or transfer house outside the state.

In short, it appears in this appeal that the shipment from out of state was not made for the seller's convenience but on the direction of the buyer who lived in a branch house area and that the delivery was made from outside the state either because the branch did not have the goods on hand or because there would be a freight saving to the buyer in getting direct shipment.

We feel, therefore, that this case is governed by the rule in the case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506. In that case Mr. Chief Justice Taft said, on page 515, that many of the sales "by the appellees were made by them before the oil to fulfill the sale was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines."

In the case of *Wiloil Co. v. Pennsylvania*, 294 U. S. 169, this Court made the exception that there was no provision in the contract requiring completion of the sale by shipment from outside of Pennsylvania and held the sale subject to tax.

The contracts in Class E did require shipment from outside of Indiana. Therefore, they fall within the rule of the *Sonneborn* case and outside the taxable exception laid down in the *Wiloil* case.

We submit, therefore, that there is an important federal question as to Class E sales as to whether they come within the rule laid down in the case of *Sonneborn Bros. v Cureton, supra.*

Appellants accordingly respectfully submit that their appeal in this case should be allowed.

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